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No. 95-992

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR INTERVENOR-APPELLEES CONSUMER FEDERATION OF AMERICA, *et al.*

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QUESTION PRESENTED

Intervenor-Appellees Consumer Federation of America, National Council of Senior Citizens, and the Office of Communication of the United Church of Christ adopt the question presented contained in the Brief of Appellees Federal Communications Commission and the United States of America.

PARTIES TO THE PROCEEDINGS

Plaintiffs:

Atlanta Interfaith Broadcasters, Inc.
A&E Television Networks
Black Entertainment Television, Inc.
Daniels Cablevision, Inc.
Discovery Communications, Inc.
E! Entertainment Television, Inc.
Lifetime Entertainment Services
International Family Entertainment, Inc.
The Learning Channel, Inc.
National Cable Satellite Corporation d/b/a C-SPAN
National Cable Television Association, Inc.
National Interfaith Cable Coalition, Inc.
QVC, Inc.
Time Warner Entertainment Company, L.P.
The Travel Channel, Inc.
Turner Broadcasting System, Inc.
USA Networks

Defendants:

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle

Federal Communications Commission
The International Association of Machinists and Aerospace Workers, AFL-CIO*
Morningstar Communications
National Association of Broadcasters
National Council of Senior Citizens
National Rural Telecommunications Cooperative
Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
United States of America
Zantech, Inc.

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*By order of the District Court dated December 2, 1994, the International Association of Machinists and Aerospace Workers, AFL-CIO, was withdrawn as a party.

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, Consumer Federation of America, National Council of Senior Citizens and the Office of Communication of the United Church of Christ, through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

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BRIEF FOR INTERVENOR-APPELLEES CONSUMER FEDERATION OF AMERICA, *et al.*

STATEMENT

Intervenor-Appellees Consumer Federation of America, National Council of Senior Citizens, and the Office of

Communication of the United Church of Christ ("CFA, *et. al.*") adopt the Statement contained in the Brief of Appellees Federal Communications Commission ("FCC") and the United States of America.

SUMMARY OF ARGUMENT

CFA, *et al.*, support the position of the United States that the decision of the court below be affirmed. CFA, *et al.*, file this separate brief solely to address one specific issue that has arisen in this litigation: whether providing cable access for local commercial television stations based on a leasing mechanism would be a constitutionally acceptable less restrictive alternative to must-carry.

Turner Broadcasting System, Inc., *et al.* ("Turner") argue that the existing "leased access" mandate in Section 612 of the 1992 Cable Act, or perhaps an expanded variant, would be an effective, yet less restrictive, alternative to must-carry. Brief for Turner Broadcasting System at 57-58. Thus, Turner claims, must-carry cannot withstand constitutional scrutiny under the test established by this Court in *Turner I*. In his dissent below, Judge Williams acknowledges there may be deficiencies in the current statutory scheme, but contends that a hypothetical leased access or similar scheme could be enacted to afford unaffiliated programmers a non-discriminatory entitlement to access at a price set by an administrative agency. The availability of such a legislative option, he suggests, renders must-carry unconstitutional. *Turner Broadcasting Sys., Inc. v. FCC*, 910 F. Supp. 734, 784 (D.D.C. 1995).

Under leased access, operators must make a certain

proportion of their capacity available to unaffiliated programmers. Section 612 delineates the number of channels that must be set aside and establishes the terms and conditions under which they may be offered. 47 U.S.C. § 532. CFA, *et al.* show here that neither existing nor hypothetically improved versions of leased access can provide a workable, equally effective alternative to must-carry.

Because it requires payment for leased access, Section 612 is inherently incapable of achieving one of the critical congressional objectives of must-carry: preserving free, over-the-air local broadcast television.[1] This point is addressed in the government's brief and is not further addressed here.

That aside, under the cable industry's own interpretation of Section 612, leased access could not be relied on to achieve any of the congressional goals underlying leased access: preserving free broadcast television, encouraging widespread dissemination of a multiplicity of programming, and promoting fair competition in programming. And, tellingly, while the cable industry enthusiastically advances leased access as an alternative to must carry in this case, it also has aggressively pursued a constitutional challenge elsewhere in the courts to *any* leased access responsibility.

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[1]The payment requirement for leased access would pose an especially insurmountable barrier for non-commercial television stations, which also are covered by must-carry under Section 615. 47 U.S.C. § 535. Neither Turner nor Judge Williams mention, much less explain, how leased access could possibly serve the special needs of public broadcasting.

Judge Williams' proposal of a theoretical version of leased access that would provide a non-discriminatory entitlement to access at a government-established price also fails. What he envisions might well expand the number and, perhaps, the variety, of independent programming voices, but it is hardly a less restrictive alternative. Whatever the validity of cable industry objections to Section 612, such complaints would be much stronger as against the hypothetical regime which Judge Williams depicts.

ARGUMENT

I. UNDER CABLE OPERATORS' OWN INTERPRETATION OF LEASED ACCESS, IT CANNOT ACCOMPLISH ANY OF THE CONGRESSIONALLY ESTABLISHED OBJECTIVES OF MUST-CARRY.

Congress declared that the must-carry provisions serve, *inter alia,* three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994). To achieve these goals, local broadcasters must be carried on cable channels without incurring costs that would threaten their very viability. This programming must be made available to such a substantial audience that it affords broadcasters the opportunity to attract advertising. And access must be beyond the manipulation of cable operators.

As the government appellees show in their brief, must-

carry meets these criteria by requiring cable operators to carry local broadcasters for no fee, by requiring cable operators to provide these channels to the entire cable audience, and by generally denying cable operators the right to decline to carry access programming.

The cable industry's interpretation of leased access raises serious questions about its potential as an alternative to must-carry. In an ongoing proceeding before the FCC, cable operators have maintained that Section 612 permits them to provide leased access programming to the least popular program tiers with the narrowest of audiences; grants authority to manipulate fees to make access unaffordable to many classes of programmers; allows them to influence program selection by setting discriminatory costs, rates and terms; and permits them even to refuse to carry programming under certain circumstances. Thus the cable industry, while trumpeting leased access under Section 612 as an alternative to must-carry, interprets Section 612 in a way that would make it incapable of accomplishing any of must-carry's objectives.

A. Cable Operators Interpret Section 612 As Allowing Dissemination Of Leased Access Programming To The Narrowest Of Cable Audiences.

To accomplish the fundamental congressional goals of must-carry, local commercial broadcast programming must be available to a broad cable audience for no extra fee. Without access to a substantial cable audience, local broadcasters may be unfairly disadvantaged from competing with cable and from attracting the advertising needed to maintain

their economic viability. Failure to reach the full cable audience also would frustrate the congressional goal of promoting the widespread dissemination of information from a multiplicity of sources. Must-carry achieves these goals by requiring cable operators to carry local commercial broadcaster channels as part of their basic service.

The cable industry's claims that leased access can be an adequate substitute for must carry are belied by the positions they continue to advance before the FCC with respect to the implementation of Section 612. Before that agency, the industry claims that it cannot be required under Section 612 to provide leased access programming as part of the widely-seen basic tiers. *See Reply Comments of Time Warner Cable*, In Re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Leased Commercial Access (FCC Docket Nos. 92-266, 96-60), filed May 31, 1996, at 26 ("Time Warner Reply Comments"); *Comments of Tele-Communications, Inc. and Request for Further Reconsideration*, In Re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Leased Commercial Access (FCC Docket Nos. 92-266, 96-60), filed May 15, 1996, at 21 ("TCI Comments"). Cable operators maintain that leased access programmers have no statutory right to have a "genuine outlet" for their programming, and that Section 612 imposes "no obligation on operators...to ensure the delivery of leased programming to all or most of its subscribers...." *Comments of the National Cable Television Association*, In Re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Leased Commercial Access (FCC Docket Nos. 92-266, 96-60), filed May 15, 1996, at 28-89 ("NCTA Comments"). Any mandatory tier placement, they

maintain, would interfere with a cable operator's programming editorial function, in violation of the First Amendment. *Time Warner Reply Comments* at 26. Cable operators maintain that under Section 612 they could make leased-access programming available only as a special premium service, provided for an extra fee, a fee not subject to FCC regulation.[2] *NCTA Comments* at 28.

Particularly under such a narrow construction (which is still under consideration by the FCC), leased access could not be an equally effective means as must-carry of achieving Congress' stated goals of preserving free broadcast television, promoting fair competition, and encouraging widespread dissemination of programming.

B. Cable Operators Insist That Leased Access Allows Them To Discriminate Among And Even Reject Programming.

Any alternative to must-carry would also have to prohibit cable operators from discriminating among or against local broadcast programming and from rejecting certain programming. Prohibiting discrimination is critical to the fundamental goals of must-carry, *i.e.*, promoting fair competition in the market for television programming and promoting

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[2]In addition, while basic tier charges are regulated by the FCC, premium charges are unregulated. 47 U.S.C. §623. The potential for cable operators to charge discriminatory premium fees for local commercial broadcasting under cable leased access further undermines its potential as an effective alternative to must-carry.

programming from a multiplicity of sources.

To this end, the must-carry provisions require cable operators to allocate a certain number of channels on the system to local commercial and non-commercial broadcasters. 47 U.S.C. §§ 534, 535. Cable operators may exercise discretion to choose among local commercial broadcast stations only when the number of qualified must-carry channels exceeds the allocation. 47 U.S.C. § 534(b)(2).

Leased access, therefore, could only achieve even part of the goals of must-carry if it similarly requires non-discriminatory access by all local programmers who request to be carried. Cable operators argue, however, that leased access allows operators to discriminate among programmers and to reject programmers of certain classes.

Both TCI and NCTA, for example, assert that the FCC cannot impose a first-come, first-served leasing requirement on cable operators under Section 612 of the Act. *NCTA Comments* at 31; *TCI Comments* at 36. NCTA maintains that Congress did not intend to require operators to make leased access available on a non-discriminatory basis. *NCTA Comments* at 31. To the contrary, NCTA argues that Congress meant to "allow operators to establish price, terms and conditions that *are* discriminatory." *Id.* And while it is Section 612's similarity to regulatory schemes for common carriers that underlies Judge Williams suggestion that it could serve as an alternative to must-carry, TCI asserts that the legislative history of leased access specifically indicates that Section 612 is not intended to operate as a common carrier regulation. *TCI Comments* at 36.

In fact, cable operators have specifically proposed that they be allowed to deny leased access to certain part-time programmers. See, e.g., *Time-Warner Reply Comments* at 19 (arguing cable operators should not have to provide leased-access to programmers who request access for less than eight hours a day, seven days a week); *TCI Comments* at 33 (operator should be able to deny leased access to a part-time programmer entirely if it would require preempting a channel being used by an operator's affiliate).

Under cable operators' proposed interpretation, therefore, leased access would allow operators to deny access to certain programmers and would authorize discrimination among programs. It thus could not be as effective as must-carry in achieving the congressional objectives of promoting a multiplicity of programming and fair competition.

C. The Cable Industry, While Offering Leased Access As A Constitutionally Acceptable Alternative To Must Carry In This Case, Is Challenging Its Constitutionality Before The FCC And In The Courts.

While Turner suggests to this Court that leased access provides a reasonable alternative to the allegedly constitutionally defective must-carry provisions, Brief of Turner Broadcasting System at 58, the cable industry is contending before the FCC and the courts that leased access itself is unconstitutional. In fact, in litigation involving most of the same industry parties now before this Court, the cable industry has challenged the constitutionality of *any* leased access provision. *See* Brief for Appellants at 63-70, *Time Warner Entertainment Co. v. FCC*, (D.C. Cir. 1995) (No. 93-5349).

Cable operators contend that leased access, like must-carry, violates the First Amendment. *Id.*; *see also TCI Comments* at 40-43. TCI, in fact, contends that the leased access provisions of the Cable Act have even more serious problems than the must-carry provisions because they seek to ensure access to a multiplicity of diverse sources, and thus are subject to the highest degree of First Amendment scrutiny.[3] *TCI Comments* at 41.

II. A HYPOTHETICAL VERSION OF LEASED ACCESS THAT WOULD PROVIDE NON-DISCRIMINATORY ACCESS AT A SET ADMINISTRATIVE PRICE WOULD FACE EVEN STIFFER CONSTITUTIONAL CHALLENGES FROM CABLE OPERATORS THAN HAVE CURRENT LEASED ACCESS PROVISIONS AND IS NOT A LESS RESTRICTIVE ALTERNATIVE TO MUST-CARRY.

Giving tacit recognition to the shortcomings of the existing leased access scheme enacted by Congress in Section 612, Judge Williams suggests that a hypothetical, and truly non-discriminatory, leased access mechanism could be a suitable and less restrictive alternative to must carry. *Turner*, 910 F. Supp. at 784.

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[3]Cable operators also maintain that if an administrative agency sets fees at a level that does not provide full compensation for the value of the channels, such a fee results in a taking without just compensation in violation of the Fifth Amendment. *See Time Warner Reply Comments* at 24, n. 46; *TCI Comments* at 39.

Leaving aside the speculative nature of the claim that such a "pure" system realistically could be devised and enacted,[4] the very characteristics required for a truly non-discriminatory access scheme would make the system even more burdensome for cable operators to administer, and even more intrusive into their programming activities. Making an analogy to common-carrier type price and access regulations used for public utilities, Judge Williams contends that Congress could craft a scheme that presumably would serve all programmers on a first-come first-served basis at regulated prices. But selecting programmers would pose hitherto unimagined problems, especially in the context of the First Amendment. Since, by definition, auctions could not be employed to select programmers, it would be necessary to devise an extremely complicated selection mechanism, and one which would likely be susceptible to manipulation as well. And the notion of devising common carrier or cost-based price regulation as a *less-restrictive* alternative is oxymoronic. Indeed, in recently rejecting the cable industry's First Amendment challenge to the far less intrusive price regulations established under the 1992 Act, Judge Randolph contrasted them with the kind of regulations which would be needed under Judge Williams hypothetical regime. Judge Randolph said that

> The obvious alternative - holding a cost of service proceeding for each regulated cable system - would also cause operators to incur

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[4]Unlike Congress, Judge Williams did not confront the political, practical and technical obstacles to creating a truly non-discriminatory, price regulated service. He simply assumed it could be done.

expenses and would in any event be unworkable in light of administrative burdens such a scheme would entail.

Time Warner Entertainment Co, L.P v. FCC, 56 F.3d 151, 186 (D.C. Cir. 1995). Certainly from the perspective of the cable industry, as well as for the reasons discussed above and in the government's brief, a common-carrier-type provision would not be a constitutionally acceptable, less restrictive alternative.

CONCLUSION

Cable leased access cannot provide a constitutionally acceptable less restrictive alternative to must-carry. The judgment of the D.C. Circuit Court should be affirmed.*

Respectfully submitted,

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*Counsel for intervenor-appellees would like to thank law student intern Katherine Barton for her contribution to this brief.

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